

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

**BRIEF FOR APPELLANT AND
JOINT APPENDIX**

863

IN THE

United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9887

THELMA F. OWEN, *Appellant*,

v.

MAX C. SCHWARTZ, THEODORE S. GRAPE, GRACE
L. GRAPE, *Appellees*.

Appeal from the District Court of the United States for the
District of Columbia.

*United States Court of Appeals
for the District of Columbia*

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GRACE L. GRAPE, *Appellees*.

Appeal From the District Court of the United States for
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BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

1. Appellant, as Plaintiff, filed a complaint in the District Court against the Appellees, claiming judgment for \$5,000.00 as the return of a deposit in that amount given to Appellees under an executory contract for the purchase of real estate located in the District of Columbia (App. #1).

The District Court of the United States for the District of Columbia had jurisdiction by virtue of Title 11, Section 306, D. C. Code (1940), (Act of Congress, February 27, 1877, 19 Stat. 253, Ch. 69, Sec. 2); and Title 11, Sec. 305, D. C. Code (1940), (March 3, 1901, 31 Stat. 1199, Ch. 854, Sec. 61, as amended).

2. Upon trial the lower court excluded evidence offered by Appellant, directed a verdict for Appellees at conclusion of Appellant's case in chief, and entered final judgment in favor of Appellees (App. #5). This Court has jurisdiction of Appellant's appeal from that judgment.—Title 17, Sec. 101, D. C. Code (1940), (Act, March 3, 1901, 31 Stat. 1225, Ch. 854, Sec. 226, as amended).

STATEMENT OF THE CASE.

This is an appeal by Plaintiff below from a judgment entered upon a directed verdict rendered in Defendant's favor at the conclusion of Plaintiff's case, in a civil action. The suit sought the return to Appellant of a \$5,000.00 deposit which she had given the Appellees under a contract for the purchase of premises 3351 Mt. Pleasant Street, N. W., in Washington, District of Columbia (App. #2). Appellant's claim was that she was induced to execute a contract dated February 13, 1947 for the purchase of that property because of two oral representations made to her by appellee Schwartz, a real estate broker for the appellees Grape, who were the owners of the property. These were: 1. That a \$30,000.00 loan commitment had been secured on the house and land; and 2. that the land to be conveyed contained 1¼ acres. In reliance upon Schwartz' statements on these two points, Appellant signed the contract, which did not contain a description of the land nor any statement concerning the amount of any deed of trust, and deposited a total of \$5,000.00 with Schwartz, who turned over a portion of it to appellees Grape. Both representations were false.

At pretrial, the misrepresentation concerning the trust was stated that Schwartz had told Appellant: "he had got a trust of \$30,000.00" (R. 75). Appellees denied that Appellant had relied upon the representations alleged; admitted that the real estate contained substantially less than one acre; and said they had no knowledge as to whether a loan or trust of \$30,000.00 could be procured (Answer; App. #3, #4). Although the answer did not deny that Schwartz had made the alleged statements, at pretrial proceedings Schwartz did deny that he had represented the property to be 1¼ acres, and he had or could get a commitment for a \$30,000.00 trust (R. 75, 76).

The case came on for jury trial on those issues of fact. The Court excluded all of Appellant's evidence touching the two alleged misrepresentations (App. #11, #12) on the ground that public policy requires written contracts to be protected (R. 42, 43). At the conclusion of the Appellant's case a verdict was directed by the Court in favor of the Appellees, upon which final judgment in their favor was entered (App. #5). As disclosed by the testimony received and proffered, the facts were these:

In February of 1947 Appellant desired to buy a house for use as a rooming or apartment house (R. 29). On February the 12th, 1947, Appellant was taken by one Talbut, a real estate salesman for appellee Schwartz, to see the house and lot at 3351 Mt. Pleasant Street, N. W. (R. 25). The following day the Appellant returned to the property together with Schwartz, Talbut and her sister, Lola (App. #8). While they were in the kitchen of the house, and before the contract was signed, Schwartz said to the Appellant that *he had obtained* a commitment for a \$30,000.00 loan on this property (App. #8, #9). He also told her that the size of the lot was an acre and a quarter (App. #9).

Upon Appellees' motion, the Court ordered stricken all testimony pertaining to the statements by Schwartz as to the loan on the property and the acreage (App. #11, #12).

She saw the lot, and it looked to her to be about the same in size as a lot of $1\frac{1}{2}$ acres on her own residence property (R. 28, 29).

As a result of what Schwartz told her and in reliance upon his statement as to the commitment, she signed a contract that day, February 13th (App. #12). This was a printed form filled in by Schwartz in his own writing, and he also signed it. She did not recall Talbut's ever signing it. She signed just the one paper that day (App. #9). A contract bearing that date (App. #16) which counsel for the Appellees produced was identified as "Plaintiff's Exhibit (1) for identification", and shown to Appellant. This bore Talbut's signature. She identified her own signature on it, but her best memory was that the contract she signed on the 13th had contained in it that the land was $1\frac{1}{4}$ acres (App. #10). The exhibit did not have the size of the ground on it. The property was described only as "3351 Mt. Pleasant Street, N. W." Several changes had been made on this contract, notably the price from "40" to "44" thousand dollars (App. #16). Another contract, which had been identified at the pretrial proceedings, was marked "Plaintiff's Exhibit (2)", and received in evidence (App. #17). This was a typewritten contract (App. #10). Both contracts (P's. Ex. No. 1 and No. 2; App. #16-19) were read to the jury, together with two cancelled checks of Appellant's.

She signed the typewritten contract (P's. Ex. No. 2) on February 14th, when Schwartz came to her house in a hurry and told her to sign it, that it was just the same as the original (App. #10). Schwartz picked up the second check (\$3,000.00; P's. Ex. No. 3) from Appellant's sister, Lola, on February 17th. That day or the next, at Schwartz' request, Appellant applied at the Perpetual Building and Loan Association for a loan commitment on the property for \$35,000.00. The highest that organization would approve, however, was one for \$25,000.00 (App. #11). The

Perpetual's representative inspected the property on February 19th and sent the \$25,000.00 commitment to Schwartz on the 20th (R. 54). Appellant then told Schwartz to use his \$30,000.00 commitment, the one he said he had obtained (R. 50).

Appellant's sister, Lola Owen, also testified, generally corroborating what Appellant had said. Lola definitely testified that the contract identified as Plaintiff's Exhibit No. 1 was *not* the paper which they had signed on February 13th,—that the one which was signed that day had written on it $1\frac{1}{4}$ acres of ground (App. #13). When they found that a \$30,000.00 commitment had never been obtained and the ground contained less than an acre, she asked Mr. Schwartz to return the deposit, and refused to settle at the title company (App. #12, #14; R. 62, 63). The \$5,000.00 was not returned and the matter was turned over to Appellant's attorney (R. 63).

Lola's testimony of Schwartz' statements to them concerning the loan commitment and the acreage of the property, was also excluded by the Court (App. #13; R. 61), upon objection of Appellees. This witness offered to prove that Schwartz had made those representations, and had he not told her and the Appellant that there was a \$30,000.00 commitment and that the land was $1\frac{1}{4}$ acres, she would not have issued a check nor approved the contract. This latter question was also excluded upon Appellees' objection (App. #14).

STATEMENT OF POINTS.

I.

The Court erred in excluding Appellant's evidence that Appellee, Schwartz, represented to her and her sister that he had obtained a \$30,000.00 loan commitment on the property she was buying.

II.

The Court erred in excluding Appellant's evidence that Appellee, Schwartz, represented to her and her sister that the property she was buying contained $1\frac{1}{4}$ acres of land.

III.

The Court erred in excluding the question put to Appellant's witness as to whether she would have drawn a check and approved the contract of purchase had it not been for Schwartz' representations.

IV.

The Court erred in excluding oral evidence as to the contents of a prior contract later replaced by the actions of Schwartz, and in ruling as a matter of law that the contract marked "P's. Ex. No. 1" was actually the original contract signed by Appellant on its date.

V.

The Court erred in directing a verdict in favor of the Appellees.

SUMMARY OF ARGUMENT.

Appellant sued to recover back her deposit on a contract for the purchase of real estate in the District of Columbia, on the ground that the deposit and her signature to the contract were obtained by misrepresentations of the defendant real estate agent in behalf of the defendant owners, in two particulars: (a) That the agent had procured an actual commitment of a \$30,000.00 first trust loan on the property; and (b) that the property contained $1\frac{1}{4}$ acres of land. Testimony was offered to show that had it not been for these representations, Appellant would not have entered into the contract; and that the representations were false.

Under familiar rules of law *either one* of these misrepre-

sentations, if relied upon by Appellant when she signed the contract and put up the deposit, was sufficient to justify her rescission of the contract and recovery of the deposit. In the trial below the Court disposed of her case by excluding from the jury all evidence pertinent to *both* representations, and thus the errors appealed from take the form, chiefly, of rulings upon the admissibility of evidence, going to the very heart of the case. The specific points are as follows:

I.

Parol evidence was admissible to show that the written contract for the sale of land had been induced by misrepresentations upon which the buyer relied. Appellant's evidence, therefore, that the appellee Schwartz represented to her that he *had procured* a first trust *commitment* for \$30,000.00, and that she would not have signed the contract if there were any doubt about the first trust loan, was clearly admissible. This representation was one of existing fact and was not of a promissory or future nature.

The fact that the stricken testimony varied slightly from the allegation in the complaint was not made a ground of objection and appellees' rights were in no way prejudiced by it.

II.

The contract was silent as to the extent or any description of the land and house, except by street number. Appellant's evidence, then, that she was assured as a matter of fact by the appellee Schwartz that the property contained $1\frac{1}{4}$ acres of land was clearly admissible upon either one of two theories: (a) Since admittedly the land contained substantially less than one acre, Schwartz' statement was a misrepresentation of fact; and (b) parol evidence was admissible to remove a latent ambiguity in the written contract.

III.

In an action based upon fraudulent inducement, such as this, it is incumbent upon a plaintiff to prove that he was induced to act by reliance upon the alleged misrepresentations. It was therefore error for the Court in this case to exclude the question put to a witness to show that Appellant and a witness would not have bought the property had not the representations been made.

IV-V.

(a) Appellant and her witness claimed and offered to testify that the first and original contract which she signed for the purchase of this property contained a handwritten statement that the land was an acre-and-a-quarter, and that contract, which had been signed on February the 13th, had also been signed by *Schwartz*. At the trial defense counsel produced a contract signed by the Appellant, without a statement as to the size of the land and *signed by Talbut and not by Schwartz*. Both Appellant and her sister testified that this was *not* the contract which Appellant signed on the 13th, although Appellant said she had signed only one paper on that day. Under these circumstances the refusal of the Court to admit oral testimony of the contents of the original contract signed by Appellant and Schwartz, as to the size of the land, was error.

(b) Under the circumstances as set forth in paragraph (a), *supra*, an issue of *fact* was created as to whether or not the document marked "Plaintiff's Exhibit No. 1" was actually the original contract signed by Plaintiff on its date. The trial Court apparently ruled as a *matter of law* that it was such contract, and directed a verdict upon the whole case for the Defendants. Under such circumstances this was error.

ARGUMENT

I.

MISREPRESENTATION AS TO LOAN.

(a) Oral Evidence Was Admissible to Prove Misrepresentation as to Amount of Loan Commitment.

In the District of Columbia the law is well settled that false representations orally made as an inducement to procure execution of a written contract are admissible in evidence, even though they vary or change the effect of the written contract.—*Smith v. O'Connor*, 56 App. D. C. 367, 88 Fed. (2d.) 749; see also *First National Bank v. Fox*, 40 App. D. C. 430, where this Court held:

“ . . . it is equally well established that false and fraudulent representations made to induce a contract, evidenced by a written agreement, may be introduced to defeat its enforcement. The elementary principle that fraud vitiates whatever it touches is not overruled by the doctrine that a written contract may not be varied by evidence of contemporaneous oral stipulations. Where a party is fraudulently induced to enter into a contract the fraud cannot be rendered successful by reducing the contract to writing.”

The rule has been applied specifically to representations as to loan commitments. In 66 Corpus Juris, Sec. 151, p. 598, it is said:

“A representation that a third person has assented to a loan for a certain amount, upon the security of the premises, is such as may serve as a basis for fraud or misrepresentations vitiating the sale; but a statement that such a person will lend a particular amount thereon, or that the speaker has, or will procure, a party who will make such a loan, has been held insufficient for that purpose.”

The cases on this point are few, but they bear out the distinction as thus stated in Corpus Juris. It is the contention of Appellant that the statement made by Schwartz in the case at bar is of the first type; that is, to the effect that

he already had a commitment for a \$30,000.00 loan on the property. Miss Owen's testimony clearly demonstrates this (App. #8, #9), and a brief portion of it is repeated here:

".... He said, 'I am not sure about a thirty-five, *but I have a thirty.*' "

"Q.—That he had a thirty?

"A.—Yes.

"Q.—That was before you signed the contract?

"A.—Yes."

And again (App. #12), Appellant testified:

"A.—I didn't want to give him the check until he was sure of the thirty thousand. I wanted him to put the thirty thousand in the contract. . . I did talk to him about the contract and he said 'It would sound better to put all cash, because *we know we have got the \$30,000.00.*' " "

And further (App. #12):

"I bought the property on the understanding there was a thirty thousand commitment on it. Otherwise I wouldn't have taken it."

Obviously, then, the testimony of the Appellant disclosed a positive representation of an existing fact by Schwartz to the effect that he had, at that time, a commitment for a \$30,000.00 loan on this property, which would enable Appellant to buy. She would then have to put up only \$14,800.00 in cash above the \$30,000.00 first trust. Schwartz did not have a commitment for \$30,000.00 (App. #12). The highest obtainable was for \$25,000.00, which would necessitate an additional \$5,000.00 in cash to be invested by the Appellant.

An almost identical representation had been made in the case of *Kreshover v. Berger et al*, 119 N. Y. S. 737, decided

* Emphasis supplied.

by the Appellate Division of the Supreme Court of New York in 1909. That action was to recover a \$2,000.00 deposit on real estate because of three misrepresentations by the seller's agent. The trial court had used the same reasoning as that which the trial court in the case at bar first relied upon, to keep out evidence of oral representations:

"The trial court refused to receive any evidence as to the representations, or their falsity, upon the ground that they would vary the written instrument, and are cognizable only in equity."

This was held erroneous, and the appellate court reversed the trial court. The opinion continues:

"The third representation which we consider necessary to notice is to the effect that the Lawyers' Title Insurance and Trust Company had accepted a loan for \$70,000.00 upon said premises. The fact, as alleged, is that the company had declined to pass a loan of \$70,000.00. . . . The representation appears to be material, both as bearing upon the value of the property and *also upon the facility with which plaintiff could complete the purchase*, which involved mortgaging the property for \$75,000.00 or \$70,000.00 . . . *and the plaintiff should have been allowed to prove that they were made, were false, and were relied upon.*" (Emphasis supplied.)

Another case involving a representation as to a loan was decided by the Court of Civil Appeals of Texas in 1934. In *Shaffer v. Rhyne*, 75 S. W. (2d.) 133, the defense to a specific performance suit was misrepresentation inducing the defendant to sign the contract. In reversing the trial court and holding that there had been sufficient evidence to go to the jury, the Court of Appeals said:

"Under these circumstances, if, as testified to by the defendant, the plaintiff Rowell, under a claim of familiarity with the rules and regulations of said bank, represented to the defendant as a fact that a loan could be obtained upon said land from said bank . . . and the defendant was misled thereby and so induced

to enter into said contract to his injury, and if under these circumstances the representations were such that the defendant had a right to rely thereon, then clearly the contract was induced by actionable fraud.”

The only other case directly bearing on a representation of this type, which counsel has been able to find, was *Edwards v. French*, 263 S. W. 132, 304 Mo. 194. Here the representation was that:

“They had a man, or would procure a man, who would loan defendant sufficient on plaintiff’s farm to make the cash payment.”

The Court held that such statements were of a promissory character and not statements of existing facts. The distinction is readily seen;—for the most that could be said of the representation in *Edwards v. French* is that they had a man they *expected* would loan defendant the money, or at least they would be able to find a man who would make such a loan.

Clearly, the stricken testimony in the case at bar would have been sufficient to take the case to the jury as to a misrepresentation of the fact that a commitment for \$30,000.00 had been obtained. The learned Court erred in striking this testimony out on the ground that it could not be received in contradiction to the terms of the written contract.—*Goldsten v. Burka*, 43 At. (2d) 712 (D. C. Mun.).

(b) Variance Between Complaint and Testimony.

Objection to this testimony in the trial was based on one ground only. Counsel for Appellees stated:

“... These are things that happened before the signing of this contract. They should be merged in it, and I would like to call your Honor’s attention to paragraph 17 of this contract, which says this is the entire contract. There are no other statements, oral or written, in the entire contract.” (R. 40.)

And further, counsel said:

“... All that evidence was in, or a lot of it was in, before the contract was in evidence, and it is on the

basis of what the contract says that I ask that all of it go out.” (R. 47.)

The learned court below agreed, and struck the evidence out on the ground that it was in violation of public policy to admit oral testimony in contradiction of the terms of the contract. (R. 42, 43). No mention was made of any variance between pleadings and proof, nor was a continuance requested by appellees.

But appellees have designated, without objection by Appellant, as a part of this record, the Court’s opinion given when overruling Appellant’s Motion for New Trial. There, a *new and different* reason was advanced for the first time by Appellees and followed by the Court for having excluded the evidence as to the loan commitment. This reason was that there was a variance between the allegations of the complaint and the testimony which was offered and excluded (App. #15, #16). The complaint alleged that Schwartz had stated that a \$30,000.00 loan could be secured on the said house and land; whereas the pretrial statement and the actual testimony offered was, as shown above, that Schwartz had said that he had already “got” the \$30,000.00 commitment. In ruling on the motion for new trial the Court said (App. #16):

“No motion was made to amend the pleading, to amend the complaint, and if there had been, the Court, of course, would have had to refuse it because the amendment of the pleading is in the Court’s discretion . . .”

There are several reasons why the Court was in error in attempting to sustain its exclusion of the testimony on the basis of this claimed variance:

1. Even before the new rules, if objection was not made specifically upon the ground of variance at the time the testimony was offered, the defect was held cured.—*Nashua Bank v. Anglo-American Co.*, 189 U. S. 221, 47 L. Ed. 782. In *Capital Traction Company v. Snowden*, 48 App. D. C. 344, this Honorable Court said:

“Neither is defendant in position at this stage of the case to claim a variance between the declaration and the proof as offered by it tending to establish ‘last clear chance’. This testimony was voluntarily offered by the defendant, *and the question of variance was not raised in the court below.*”

This point was also passed upon by the Supreme Court of the United States in a case arising in the District of Columbia, in *Standard Oil Company v. Brown*, 218 U. S. 78, 54 Law Ed. 939. Here the Supreme Court (at page 945, Law Ed.) said:

“In the case at bar, the company could not have been misled. *It made no objection to the testimony of the plaintiff* (defendant in error here). It replied to it by testimony of like kind. *It did not indicate in what way the proof varied from the pleadings, nor move for a continuance.*” (Emphasis supplied.)

2. The Federal Rules of Civil Procedure retain the requirement that a party objecting to evidence must state the grounds therefor.—Rule 46, Federal Rules of Civil Procedure, 28 U.S.C.A., following Section 723c. The objections to admission of evidence must be specific.—*Johnston v. Riley*, 82 App. D. C. 6, 160 F. (2d) 249.

3. This Court, since the adoption of the new rules, has adhered to the same principle with respect to admissibility of testimony claimed to be at variance with the pleadings.—*Rabenovets v. Crossland, et als*, 78 U. S. App. D. C. 54, 137 Fed. (2d.) 675:

“The chief contention of appellant Rabenovets is that appellees should not have been permitted, under a complaint which charged a permanently shortened leg, to prove a pelvic tilt and spinal curvature. We need not decide whether the complaint gave adequate notice of the nature of the injuries. If it did not, appellant would have been entitled to a continuance, and we must assume that he would have obtained one on request. Federal Rules of Civil Procedure, rule 15(b), 28 U. S. C. A. following section 723c. *He objected to the testi-*

mony, but did not ask for a continuance. In these circumstances we are satisfied that there was no prejudicial error in admitting the testimony." (Emphasis supplied.)

4. Had any attention been called during the trial to the alleged discrepancy between the complaint and the testimony, Appellant would have asked leave to amend the pleadings to conform to the evidence, under Rule 15(b), F. R. C. P., *supra*.

Although the trial court, on the motion for new trial, indicated that it would not have granted leave to amend, that action, if taken, would probably have been subject to correction upon appeal. Furthermore, even upon appeal the pleadings can be amended, where the amendment would not raise an issue outside the original theory. Accordingly, although Appellant does not believe that the point as to variance is well taken at all, still if there is anything to it, permission is hereby requested to so amend the complaint.—Rule 15(b), *supra*.

5. The claimed variance is not a substantial variance, in any event. The occurrence was sufficiently described to put appellees upon notice to meet it.—*Maryland Gas Co. v. Gerlaske*, 68 F. (2d) 497.

Although there is a distinction in law between a representation that "he had gotten a commitment" and one to the effect that "a ^{loan} commitment could be obtained", still the gist of the action of Schwartz upon which the Appellant was relying in the complaint was readily apparent to the Appellees. It is impossible to see how they could have been in any way prejudiced by the slight difference in the wording of Schwartz' actual statement to the Appellant, as testified to, particularly when Schwartz, at pre-trial, denied making *any* such statement.

For all of the foregoing reasons the action of the Court in excluding the evidence relating to the loan commitment, cannot be upheld on the ground of a variance between the complaint and the testimony.

II.

MISREPRESENTATION AS TO ACREAGE.**(a) Schwartz' Statement that Land Contained 1¼ Acres Was Admissible As A Representation:**

As shown by testimony contained in the Record, p. 27, and Appendix, p. 9, the Appellant was interested in the size of the lot surrounding the house she was purchasing. Schwartz told her that it contained 1¼ acres of land; actually it contained about half that area. He assured her that the land was so large that it could accommodate seven row houses in the event Appellant desired to build. She physically viewed the property before signing the contract.

A substantial misrepresentation as to the number of acres or square feet in property being purchased is ground for rescission of the contract.

This Honorable Court, in *Dulin v. Sharp*, 43 App. D. C. 550, upheld a decree granting the purchaser an abatement in the purchase price because of a shortage of seventy-eight acres of farm land purchased in Virginia. The purchaser did not find out about the shortage in the land until after he had accepted the deed and taken physical possession. The Court reviewed the Virginia law in cases of this type, and made the following statement:

“But independent of the decisions of the Virginia courts the great weight of authority is to the effect that where the vendor represents to the vendee that a tract contains a given number of acres, the vendee may rely upon the representation, . . . *The rule is the same where the vendee is taken upon the premises and shown the boundaries.*” (Emphasis supplied.)

This Court's later decision in the analogous case of *Seek v. Harris*, 76 App. D. C. 404, 132 Fed. (2d.) 19, which cited and followed *Turner v. Brewer*, 54 App. D. C. 363, 298 Fed. 685, indicates that this rule is unchanged.

Courts of other jurisdictions have allowed evidence of oral representations of the quantity of front footage and

acreage. In *Younis v. Hart*, 138 Pac. (2d) 323, 59 Calif. App. (2d.) 99, the oral representation was that this property had 110 feet of frontage on Valley Boulevard, and was 300 feet deep. Actually the lot fronted 102.79 feet on the boulevard, although it was 300 feet deep. The Court held that a single material misstatement knowingly made by the vendor and relied upon by the purchaser is ground for rescission of a land contract, and damages. The following language of the California Court is most appropriate to the case at bar:

“The representation that the area of the lot was 110 feet by 300 feet indicated that the surface contained 2,163 square feet more than its actual content. While such an exaggeration of the acreage of a cotton plantation might be unimportant, *yet in the purchase of a city lot, a statement that its area is that much greater than its exact measurements is material and goes directly to the heart of the transaction . . .*”

(At page 326):

“... The fact that plaintiffs visited the property and walked over it to make an inspection does not necessarily determine that they depended upon their own observation in determining the area of the lot.”

Appellant also cites *Landfried v. Milam*, 214 S. W. 847 (Tex. Civ. App.), where the salesman for the sellers falsely told the buyer that the lots being purchased were each 50 by 155 feet in size.

In *Fosgate v. Mocatee Fruit Company*, 299 Fed. 963 (affirmed 12 Fed. (2d.) 250), the oral representation was that the Mocatee grove contained approximately 175 acres, and the land surrounding aggregated 300 acres. In fact, there was a large discrepancy in the acreage. The District Court Judge, who was affirmed by the Fifth Circuit Court of Appeals, held:

“The fact that he had an opportunity to measure the land does not strike me as material. I do not understand that one, when shown lands, is negligent because

he does not have them surveyed, but accepts the vendor's statement of the acres."

(b) Statement Admissible Because of Latent Ambiguity in the Written Contract.

There was a mutual mistake, or at least a misunderstanding, between Appellant and the appellee Schwartz as to the amount of land and the particular property that was being purchased, according to the Appellant's testimony. In his opening statement (R. 8) counsel for Appellees stated that the house was situated upon *two* lots. Appellant was under the impression that she was buying a house and *one* lot containing $1\frac{1}{4}$ acres. The contract was entirely silent upon this point. The property was described only by street address: "3351 Mt. Pleasant Street, N. W." Both contracts were left blank as to lot and square, or parcel number (App. #16, #18).

Parol evidence may be received to vary or clarify the terms of a written contract in order that the actual understanding of the parties may be discovered.—*Howenstein Realty Corporation v. Richardson*, 77 App. D. C. 299, 135, Fed. (2d.) 803. In that case this Court was careful to point out that the contract referred within itself to means which could render certain the description which the parties intended; that is, that the land was described in the contract as a certain, numbered parcel in a square in the District of Columbia. Such a description is entirely lacking in the contracts in the case at bar.

The exact point was before this Court in the case of *Okie v. Person*, 23 App. D. C. 170. Here there was a lease, and the only description of the premises leased was "no. 3219 U street northwest, the same being a dwelling . . ." Objection had been made in the trial court to the admission of evidence of conversations between the appellant and appellee before the execution of the lease. This Court said:

"But it is very clear to us that there was ambiguity in the lease, latent ambiguity, which oral testimony was

admissible to remove; and that the testimony which was admitted was of a character to remove the ambiguity. There was no patent error in the lease. The expression, 'premises No. 3219 U street northwest' might or might not be sufficiently definite to designate a specific piece of property....

"It is clear to us, therefore, that there was latent ambiguity in the lease; and the law is too well established to need citation of authorities that oral evidence is admissible to remove such ambiguity."

(c) The Reason Given by the Court is Not Sustained by the Authorities.

Upon the hearing on The Motion for New Trial the Court's reason for sustaining the objection to the admissibility of Appellant's testimony of Schwartz' statement that the land contained $1\frac{1}{4}$ acres, was that the Appellant, having been shown the property, was not entitled to rely on the representation (App. #15):

"Of course, that is a material misrepresentation, and standing alone would have justified a verdict for the plaintiff and would justify the granting of a new trial. But the situation was this: The plaintiff went out to look at the property twice and the plaintiff knew exactly what she was getting."

In almost all of the cases on oral misrepresentation as to the number of acres or square feet in property, that reasoning has been advanced to attempt to exclude evidence of the oral representation, and in almost all of the cases it has been rejected. The pertinent parts of the opinions cited above in sub-paragraph (a) have been emphasized as to this particular point, and it is deemed unnecessary to labor the point by the citation of any further authorities.—*Dulin v. Sharp, Seek v. Harris, Younis v. Hart, and Fosgate v. Mocatee Fruit Co., supra.*

III.**THE QUESTION PUT TO WITNESS, LOLA OWEN TO ELICIT APPELLANT'S RELIANCE UPON SCHWARTZ' REPRESENTATIONS, WAS CLEARLY ADMISSIBLE.**

In the case of *Browning v. National Capital Bank of Washington*, 13 App. D. C. (Tucker) 1, this Honorable Court held:

"We think that the court was clearly right in admitting the testimony of the president . . ., to the fact, that had the defendant by his letter have disclosed the fact of the indebtedness of Scott . . . the loan would not have been made."

In the case at bar the following question was asked and excluded, and tender of proof made (Lola Owen, App. #14):

"Would you have drawn the check and approved the contract on the 13th of February, 1947, had you not been advised by Schwartz of the representations as follows . . .?"

This question was clearly admissible.

IV-V.**THE MOTION FOR DIRECTED VERDICT SHOULD NOT HAVE BEEN GRANTED.**

At the trial counsel for Appellees admitted that if the original contract had contained the statement that the property being purchased contained $1\frac{1}{4}$ acres, and the contract written later and substituted swiftly by Schwartz was silent or omitted the acreage, then the Appellant would have a good case for requiring the return of the deposit (R. 42). The testimony showed that the one original contract signed in the kitchen of the house on the 13th of February contained the statement of $1\frac{1}{4}$ acres as the size of the property being bought. Appellees' counsel produced another paper writing which did not contain the $1\frac{1}{4}$ acre designation.

Appellees argued that because Appellant testified she signed only one paper on the 13th, Plaintiff's Exhibit No. 1, which bore the date of the 13th, was the paper described by her as having been signed on the 13th; and the fact that it was silent as to the $1\frac{1}{4}$ acres proved, as a matter of law, that the original contract did not contain the figure $1\frac{1}{4}$ acres as testified to by Appellant and her sister. But Appellant denied that this was the contract, and said that the paper she signed on the 13th had also been signed by Schwartz. *Plaintiff's Exhibit No. 1, produced by Appellees, was not signed by Schwartz, but by Talbut.* The sister of Appellant also testified that this exhibit was not the paper signed on the 13th. This clearly created an issue of fact for the jury to pass upon.

It follows, therefore, that the Appellant proved exactly what Appellees admitted would make out a case, and the granting of a directed verdict was error.

CONCLUSION.

It has long been the law of the District of Columbia that written contracts, the execution of which have been procured or induced by misrepresentation, are not protected by reason of written statements contained in the contracts. Fraud in the procurement taints the whole instrument, and it is for this reason that oral testimony of false representations made in order to obtain a signature to a written instrument is admissible; and this has nothing to do with the rule that parol evidence is not admissible to vary the terms of a written contract. The type of representations made in this case have been declared within the rule, and have been held admissible. It was clearly wrong to exclude Appellant's testimony offered to show that the agent Schwartz had told her before she signed the contract that he *had* a \$30,000.00 loan commitment, and that the house was situated upon land which contained $1\frac{1}{4}$ acres.

If there were anything at all to the belated suggestion that there was a variance between the complaint and the

proffered testimony, it cannot now be relied upon to sustain the Court's erroneous action excluding the above-mentioned evidence. It was not relied upon during the trial; and no injury was shown to have occurred to the position of the Appellees because of it, nor was a continuance requested. Appellees knew since the pre-trial proceedings at the latest, just what Appellant claimed Schwartz had told her.

Appellant had a right to rely on the real estate agent's representation as to the size of the land, and it has been consistently held that such right is in no way affected by the fact that prospective purchasers nearly always examine the property they are buying. The trial court apparently changed its position at the hearing on the motion for new trial in this case, for the Court indicated that standing alone, Schwartz' misrepresentation that there were $1\frac{1}{4}$ acres of ground was material and would have entitled Appellant to a verdict. However, the Court was of the opinion that because Appellant had looked at the property twice, she could not have been said to rely on the agent's representations. This is not in accordance with the great preponderance of the authorities.

The other points raised in the brief, Appellant feels, are also well taken; but it is believed sufficient to obtain a reversal and a new trial that Appellant was not allowed to prove her case as to the two oral misrepresentations.

Accordingly, it is crystal-clear that this case should be reversed and a new trial ordered.

Respectfully submitted,

Mark P. Friedman
Jersey A. Biles

Attorneys for Appellant.

APPENDIX

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IN THE
United States Court of Appeals

DISTRICT OF COLUMBIA.

No. 9887.

THELMA F. OWEN, *Appellant*,

v.

MAX C. SCHWARTZ, THEODORE S. GRAPE, GRACE
L. GRAPE, *Appellees*.

Appeal from the District Court of the United States for the
District of Columbia.

JOINT APPENDIX.

I.

**PLEADINGS, DOCKET ENTRIES AND OTHER
PAPERS.**

70

Filed Apr 22 1947

Complaint for Return of Real Estate Deposit

1. Plaintiff and Defendants are residents of the District of Columbia and citizens of the United States, and defendant Schwartz is a real estate broker engaged in the real estate business in the District of Columbia. The suit is for a return of a \$5,000.00 deposit to the Plaintiff from the Defendants.

2. Prior to February 13, 1947 your Plaintiff was shown the property at 3351 Mt. Pleasant Street, N. W., in the City of Washington, District of Columbia, by the defendant Schwartz who sought to sell the same to the Plaintiff, but the property was owned by the defendants Grape. As an inducement to the Plaintiff to execute the contract of February 13, 1947 the defendant Schwartz, acting on his own behalf and on behalf of his clients, defendants Grape, represented that the land to be conveyed was one-and-one-quarter ($1\frac{1}{4}$) acres, and that a \$30,000.00 loan could
71 be secured on the said house and land.

3. Plaintiff relied upon the representations so made and executed the contract dated February 13, 1947, agreeing to pay the sum of \$44,800.00 for said property, but said contract did not contain a description of the land nor any statement concerning the amount of the first deed of trust to be secured. Your Plaintiff, on the 13th of February, 1947, put up \$2,000.00 as a deposit under the terms of the contract, and four days later an additional \$3,000.00 as required under the terms of the contract. All deposits were delivered to the defendant Schwartz, but Plaintiff is informed and so believes that a portion of said deposit may have been or was delivered to the defendants Grape.

4. Said real estate consisted of substantially less than an acre, and a \$30,000.00 trust could not be procured; and your Plaintiff has rescinded said contract and demanded back her deposit for \$5,000.00.

5. Defendant Schwartz has refused to return the deposit of \$5,000.00.

6. Defendants Grape have refused to return the deposit of \$5,000.00.

Wherefore, Plaintiff claims of the Defendants the full sum of Five Thousand Dollars (\$5,000.00).

FRIEDLANDER AND BRILL

By: LEROY A. BRILL

FRIEDLANDER AND BRILL**MARK P. FRIEDLANDER****LEROY A. BRILL****Rm. 502 Hill Building****839 - 17th St., N. W.****Washington, D. C.***Attorneys for Plaintiff.***Demand for Jury Trial**

Plaintiff demands a jury trial herein.

FRIEDLANDER AND BRILL**By: LEROY A. BRILL**

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Filed May 22 1947

Answer**FIRST DEFENSE**

The complaint does not state a cause of action against defendants.

SECOND DEFENSE

1. Defendants admit the allegations of paragraph 1, but say that this Court does not have jurisdiction because the contract mentioned in paragraph 3 of the complaint specifically provides that the deposit shall be held by Max C. Schwartz \$2,000.00 and the seller \$3,000.00, and therefore the amount sued on is below the jurisdiction of this Court.

2. Defendants admit the first sentence in paragraph 2 and deny the balance of said paragraph.

3. Defendants deny that plaintiff relied upon the representations as alleged in paragraph 3 of the complaint, admit that plaintiff executed the contract dated February 13, 1947, admit that said contract did not contain a description of the land or any statement concerning the amount of the first trust to be secured thereby, admit that plaintiff put

up the sums of money as set forth in said paragraph, and state that although the sums were delivered to defendant Schwartz, the contract specifically provides that
 73 \$2,000.00 of said sums is to be held by defendant Schwartz and \$3,000.00 thereof is to be held by defendants Grape, and defendants state that said sums are held in accordance with said contract.

4. Defendants admit that said real estate consisted of substantially less than an acre, have no knowledge as to whether a trust of \$30,000.00 could or could not be procured, admit that plaintiff demanded back her deposit of \$5,000.00, but state that there was no basis for such demand. Defendants further state that plaintiff failed, neglected and refused to go through with her contract on the settlement date, and, under the provisions of said contract, her deposit was declared forfeited.

5. Defendants admit that defendant Schwartz has refused to return the sum of \$5,000.00, but state that the amount held by him is the sum of \$2,000.00.

6. Defendants admit that defendants Grape have refused to return the sum of \$5,000.00, but state that the amount held by said defendants is the sum of \$3,000.00.

THIRD DEFENSE

Defendants say that prior to February 13, 1947, plaintiff was shown in detail the property at 3351 Mt. Pleasant Street, Northwest, Washington, D. C., by defendant Schwartz and by other real estate salesmen on many occasions, and plaintiff had pointed out to her the size of the lot thereof. The contract which was entered into on February 13, 1947, by and between plaintiff and defendants provided for the payment by the plaintiff for the premises of the sum of \$44,800.00 cash at the date of conveyance, of which sum the deposit mentioned in the complaint "shall be a part". Said contract further provided that "the principals to this contract mutually agree that it shall be binding upon them, their and each of their respective heirs, execu-

tors, administrators, successors and assigns; that the provisions hereof shall survive the execution and delivery of the deed aforesaid and shall not be merged therein; that this contract contains the final and entire agreement between the parties hereto, and that they shall not be bound by any terms, conditions, statements, warranties or representations, oral or written, not herein contained".

Additional Answer of Defendants Grape.

These defendants state that at no time did they authorize defendant Schwartz to represent that the land to be conveyed was one and one-quarter acres and that a \$30,000.00 loan could be secured on the said house and land.

ALBERT F. ADAMS,
1029 National Press Bldg.,
Washington, D. C.,
Attorney for defendants.

* * * * *

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Filed Mar 18 1948

Directed Verdict and Judgment

This cause having come on for hearing on the 18th day of March, 1948, before the Court and a jury of good and lawful persons of this district, to wit:

Grady Harley	Esther Sicherman
George N. Grant	Theodore L. Edmiston
Horst E. Goede	Clement L. Gaines
Leo B. Hurney	Clarence E. Browning
Eugene V. Bishop	Bernard S. Gaunt
Archie G. Anderson	Alice K. Eaglen

who, after having been duly sworn to well and truly try the issues between Thelma F. Owen, plaintiff and Max C. Schwartz, Theodore S. Grape and Grace L. Grape, defendants and after this cause is heard and given to the jury

in charge, they upon their oath say this 18th day of March, 1948, that they find for the defendants against said plaintiff as directed by the court.

WHEREFORE, it is adjudged that said plaintiff take nothing by this action, that said defendants go hence without day, be for nothing held and recover of plaintiff their costs of defense.

HARRY M. HULL,
Clerk,

By VINCENT C. BURKE,
Deputy Clerk.

By direction of

Justice GOLDSBOROUGH.

* * * * *

II.

EXCERPTS FROM TESTIMONY AND PROCEEDINGS.

3 Opening Statement on Behalf of the Plaintiff

* * * * *

4 However, on February 13, 1947, she signed a contract, which was in the handwriting of the real estate agent on a printed form. It had in this contract the description only by the number and the street and an acre and a quarter was in this written contract.

* * * * *

14 W. Walker Hargrave

* * * * *

15 Direct Examination

By Mr. Friedlander:

Q. Your full name is W. Walker Hargrave? A. W. Walker Hargrave.

Q. You are employed by Frank S. Phillips real estate firm? A. Yes.

Q. With offices at 927 Fifteenth Street Northwest? A. That is right.

Q. Were you so employed in February and March 1947? A. Yes.

Q. Did you have any communication with a Miss Owen in reference to 3351 Mt. Pleasant Street Northwest? A. Yes.

Q. Do you have any records indicating the time that you received the call or visit from her? A. No, I do not.

* * * * *

16 Q. As a result of that telephone call did you visit the premises 3351 Mt. Pleasant Street Northwest?

A. Yes.

Q. What did you find there? Will you describe to the Court and the jury what you found? A. The property located at that address—as I recall, that is the number—was a very handsome building there, quite large, quite a bit of ground to it. I believe it is the corner of Mt. Pleasant and Monroe. It is a brick building. I have forgotten whether the roof is slate or tile. The rooms on the first and second floor are quite large, much larger than other homes of the same size.

There was a third floor with about three or four bedrooms on it. The second floor, as I recall, had only three very large rooms, a paneled porch or den, whatever you may wish to term it.

Q. Now, did you list this property for sale? A. Yes.

* * * * *

Cross Examination

By Mr. Adams:

* * * * *

18 Q. You say there were large grounds there? A. Yes.

Q. Did you walk around it? A. Yes.

Q. You saw the boundaries of the ground? A. Yes.

Q. You had no difficulty in ascertaining the boundaries of this lot? A. No.

* * * * *

23 **Thelma Frances Owen, the plaintiff, * * ***

Direct Examination

* * * * *

25 The Witness: I told my sister—I wanted my sister to see the property, to get her judgment on it. That was February 12.

By Mr. Friedlander:

Q. You have said the day before the contract was signed?
A. Yes.

* * * * *

Q. Did you return to the property the following day, the thirteenth? A. Yes.

Q. Who was with you? A. Mr. Talbutt and Mr. Schwartz and my sister.

* * * * *

26 Q. Will you tell us where you went then before the contract was signed? A. Well, we were in the kitchen. There was a table in the kitchen, and we were going out to think it over, give a thousand dollar contract, and he said put up \$2,000 on a \$40,000 contract. He said it looked better to a millionaire to put all cash, and I said, "Well, I would rather you would see about getting a commitment before I would sign anything."

By the Court:

Q. See about what? A. About the commitment, because he had said that he had a thirty thousand commitment.

By Mr. Friedlander:

27 Q. When did he say that? A. Well, that's when we signed the contract, when he said he had it.

I said, "Could we get a thirty-five thousand?"

He said, "I am not sure about a thirty-five, but I have a thirty."

Q. That he had a thirty? A. Yes.

Q. That was before you signed the contract? A. Yes.

* * * * *

Q. Did he tell you the size of the lot? A. An acre and a quarter.

* * * * *

30 A. Mr. Schwartz wrote the contract on the kitchen table.

By Mr. Friedlander:

Q. Do you have that paper?

(Mr. Adams handed a paper writing to Mr. Friedlander.)

By Mr. Friedlander:

Q. I show you this and ask you if that is your signature (handing a paper writing to the witness)? A. Yes.

Q. Can you say whether or not that paper was the paper writing that was signed at that time? A. I can't say, no.

Q. That is your signature? A. That is my signature, yes.

Q. Did Mr. Talbutt sign it in your presence? A. I
31 don't remember Mr. Talbutt signing it. Mr. Schwartz signed it.

The Court: How is that?

The Witness: I don't remember Mr. Talbutt signing it. Mr. Schwartz signed it.

By Mr. Friedlander:

Q. Do you remember how many papers you signed that day? A. Just the one.

Mr. Friedlander: May we have this marked plaintiff's for identification No. 1?

(Paper writing referred to, dated February 13, 1947, was marked Plaintiff's Exhibit 1 for identification.)

* * * * *

32 Q. On this paper is your signature? A. Yes.

Q. So far as you know, you signed only one paper on February 13, 1947, at the house? A. That is right.

* * * * *

33 The Court: The pretrial order indicates that the plaintiff contends that the contract signed on the thirteenth had an acre and a quarter on it.

Mr. Friedlander: It does not have it on there. At the pretrial they did not have it.

By Mr. Friedlander:

Q. Is that still your best memory, that it had it in there?
A. Yes.

Q. I show you this paper.

Mr. Friedlander: This has already been marked by the pretrial court, so I will offer this as Plaintiff's No. 2.

(Paper writing referred to, dated February 13, 1947, was marked Plaintiff's Exhibit 2 and offered in evidence.)

* * * * *

36 Q. Now, when was it that you actually for the first time saw this contract which is marked February 13?

Mr. Adams: Which exhibit is that?

Mr. Friedlander: That is Exhibit No. 2, the typewritten form.

The Witness: This is the contract he brought over with the change from the original, and guests were coming down the steps and we were in the reception room, and I said, "Well, wait until they stop for mail," and one thing or another. I asked Mr. Schwartz to wait until they had left, because I did not care for my guests to know my affairs.

37 He said, "well, it is just like the original. I am in a hurry. You are in a hurry. Just sign it," and that's what I did.

* * * * *

39 A. After I signed the check, and I think it was a day or two later that he phoned or I phoned him—he was to phone me, and he didn't, and I phoned him to see about the thirty thousand, because I couldn't get the thirty-five thousand.

Q. What did you do about getting the thirty-five thousand? A. Well, because I have had dealings with the Perpetual, he asked me to try the Perpetual, which I did.

Q. You made application for loan at the Perpetual? A. Yes.

Q. Did you get a commitment for thirty thousand? A. No. The highest was twenty-five.

* * * * *

46 The Court: The Court thinks the question is somewhat close, but the Court sustains the objection on the \$30,000 testimony. Is that before the Court?

Mr. Friedlander: I have forgotten.

The Court: The acre and a quarter, was it?

Mr. Adams: I am going to object to both contentions, one about the \$30,000 and the other about the acre and a quarter, and I say that—

The Court: The Court sustains the objection as to both. As I said before, the question is not free from doubt, and the Court's natural sympathy runs the other way; but the Court has thought a lot about these contracts, and it is just absolutely necessary to protect written contracts. If it was not, business would just stop.

* * * * *

47 Mr. Adams: My motion is to strike out any testimony with respect to this \$30,000 commitment and any testimony with respect to this acre and a quarter.

The Court: The motion is granted.

Mr. Friedlander: And an exception taken.

49 Q. Will you tell us, please, did you talk to Mr. Schwartz? A. I didn't want to give him the check until he was sure of the thirty thousand. I wanted him to put the thirty thousand in the contract.

Mr. Adams: That is not responsive to the question.

The Witness: I did talk to him about the contract, and he said, "It would sound better to put all cash, because we know we have got the \$30,000."

The Court: The Court is going to sustain that. Strike the testimony out.

50 The Witness: I bought the property on the understanding there was a thirty thousand commitment on it. Otherwise, I wouldn't have taken it.

51 The Court: Well, I sustain the objection.

52 Mr. Friedlander: I tender to proof by this witness that after talking to Mr. Schwartz and learning from him that he never had a commitment of \$30,000 she became ill and went to the hospital on the 8th of March, where she remained at the hospital, and thereafter returned home, where she was sick, and that during this period from the 8th of March on her sister, Lola Owen, took care of the matter.

I think that will cover my offer. That is the tender.

54 **Lola May Owen.**

55 Direct Examination

By Mr. Friedlander:

56 Q. With whom were you present on the premises at that time? A. Mr. Schwartz and Mr. Talbutt and my sister.

Q. The four of you were there? A. That is right.

* * * * *

57 Q. I show you this paper, which has been offered in evidence as Plaintiff's No. 1. Can you look at this and see whether or not that is the paper that was signed that day? Look it over carefully (handing a document to the witness). A. No, it was not.

Q. This is not the paper you signed that day? A. No, sir.

Q. What did that paper have? A. The one that was signed that day?

Q. Yes. A. Why, it had the deposit of \$2,000, but it also had an acre and a quarter of ground.

Q. You remember that being written on it? A. Yes, I do, and it was for forty thousand instead of forty-four eight.

* * * * *

61 The Reporter: (Reading) "What had been said about that acre and a quarter?"

The Court: Is that objected to?

Mr. Adams: That is right, and I object to it.

The Court: Objection sustained.

Mr. Friedlander: For the purpose of the record, I make a tender to show that this witness would testify that, in answer to that question, Mr. Schwartz represented that the property was an acre and a quarter.

The Court: The Court sustains the objection.

Mr. Friedlander: I understand, but I am making a tender of proof so that record will be complete.

* * * * *

62 Mr. Friedlander: We make a tender of proof that Mr. Schwartz represented that he had a first trust commitment of \$30,000.

The Court: Objection sustained.

* * * * *

Q. Did there come a time when you made any demand for return of the deposit from Mr. Schwartz—you personally?

A. When we found that we couldn't get the thirty thousand, yes; we asked to have it returned.

* * * * *

65 Mr. Friedlander: I will ask you this question, and do not answer until they have a chance to object. I am asking it on the strength of Browning versus National Capital Bank, 13 Appeals, page 1.

By Mr. Friedlander:

Q. Would you have drawn the check and approved the contract on the 13th of February, 1947, had you not been advised by Schwartz of the representations as follows: One, that there was a \$30,000 commitment; two, that there was an acre and a quarter of ground; and, three, that it was zoned for rooming house and apartment?

Mr. Adams: I make the same objection.

The Court: Objection sustained.

Mr. Friedlander: I just wanted it for the purpose of the record and to get an exception.

I would prove that her answer to that question would be that she would not have approved the contract and she would not have drawn the check she drew, making the deposit at that time, had that representation not been made.

* * * * *

66 Opinion of the Court

* * * * *

68 The Court thinks that these cases are clearly distinguishable, and the Court will have to direct a verdict for the defendant.

* * * * *

Hearing on Motion for New Trial

89

PROCEEDINGS

The Court. Gentlemen, in this case the Court granted a motion for a directed verdict.

There was then a motion for a new trial filed and argued and because of the evident sincerity of the plaintiff, the Court took the matter under advisement.

Two matters which appear to the plaintiff to be important for the Court's consideration are these: The situation is that the plaintiff purchased certain property from one of the defendants, the other defendant being his broker. He put up a forfeit of \$5,000. The plaintiff was unable to comply with the terms of the contract and the \$5,000 was forfeited, and this suit is a suit to recover the \$5,000.

The plaintiff says, in its motion for a new trial, that there is some evidence on the part of the plaintiff that the defendants represented—that is, the broker represented—that the amount of land involved was either an acre or an acre and a quarter. The testimony of the defendant in one place says an acre, and in another it says an acre and a quarter. As a matter of fact, it is from a half to five-eighths of an acre involved.

Of course, that is a material misrepresentation, and standing alone would have justified a verdict for the plaintiff and would justify the granting of a new trial.

90 But the situation was this: The plaintiff went out to look at the property twice and the plaintiff knew exactly what she was getting.

* * * * *

The other matter which the plaintiff deems material is that the plaintiff's testimony is to the effect that the broker stated that a \$30,000 loan could be secured on the said house and land. Now, that appears in the complaint. It is true that in the pretrial plaintiff through her counsel, I
91 presume, says that the broker represented to her

that the property contained an acre of land and that he had got a trust for \$30,000.

Now, it is perfectly evident that the presumption is that the plaintiff states her case in the strongest manner possible from her standpoint in her pleadings, and she can't strengthen the statement in her pleadings by her oral evidence. No motion was made to amend the pleading, to amend the complaint, and if there had been the Court, 92 of course, would have had to refuse it because the amendment of the pleadings is in the Court's discretion, and the presumption being that the plaintiff has stated her case as strongly as she can in the complaint, the Court should not exercise its discretion in order to enable her to boost her claim.

III.

EXCERPTS FROM EXHIBITS.

Plaintiff's Exhibit No. 1.

81

Filed Jun 7 1948

SALES CONTRACT.

Washington, D. C., Feb. 13, 1947.

Received from Thelma F. Owens a deposit of Two Thousand Dollars (\$2000.00) (Cash) (Check) to be applied as part payment of the purchase of Lot 3351, Mt. Pleasant St., N. W., in Square with improvements thereon known as..... in the District of Columbia..... upon the following terms of sale:

(1) Price, Forty-four Thousand Eight Hundred Dollars (\$44,800.00).

(2) Purchaser agrees to pay Forty-four Eight Hundred Dollars (\$44,800.00) cash at the date of conveyance, of which sum this deposit shall be a part.

(14) The entire deposit shall be held by Max C. Schwartz, Agent, until settlement hereunder is made or until the deposit is forfeited.

Executed in

H. B. TALBUTT.
Agent.

We, the undersigned, hereby ratify, accept and agree to the above memorandum of sale and acknowledge it to be our contract.

THELMA F. OWEN,
Purchaser.

THEODORE S. GRAPE,
Seller.

Feb. 13, 1947.

82

Filed May 14, 1948

Plaintiff's Exhibit No. 2.

(Pre-Trial Exhibit)

SALES CONTRACT.

Washington, D. C., February 13, 1947.

Received from Thelma F. Owen a deposit of Two Thousand and No./100 Dollars (\$2,000.00). (Check) Purchaser agrees to pay additional \$3,000 to Max C. Schwartz on or before February 17, 1947, to be applied as part payment of the purchase of Lot in Square with improvements thereon known as 3351 Mt. Pleasant St., N. W., including stove, refrigerator, all venetian blinds, mirrors, awnings

and screens now in property, in the District of Columbia, upon the following terms of sale:

(1) Price, Forty-four Thousand Eight Hundred and No/100 Dollars (\$44,800.00).

(2) Purchaser agrees to pay Forty-four Thousand Eight hundred Dollars (\$44,800.00) cash at the date of conveyance, of which sum this deposit shall be a part.

* * * * *

(14) The deposit shall be held by Max C. Schwartz, \$2,000; Seller, \$3,000.00, Agent, until settlement hereunder is made or until the deposit is forfeited. In the event of the forfeiture of the deposit, the Agent shall retain one-half thereof as a compensation for his services and shall pay to the seller the remaining one-half of the forfeited deposit.

* * * * *

(16) The seller agrees to pay to Max C. Schwartz \$2,000.00, Agent, the amount of which said commission being hereby assigned to the Agent by the seller out of the proceeds of sale.

* * * * *

(17) The principals to this contract mutually agree that it shall be binding upon them, their and each of their respective heirs, executors, administrators, successors and assigns; that the provisions hereof shall survive the execution and delivery of the deed aforesaid and shall not be merged therein; that this contract contains the final and entire agreement between the parties hereto, and that they shall not be bound by any terms, conditions, statements, warranties or representations, oral or written, not herein contained. Executed in quadruplet.

MAX C. SCHWARTZ,
Agent.

We, the undersigned, hereby ratify, accept and agree to the above memorandum of sale and acknowledge it to be our contract.

THELMA F. OWEN,
Purchaser.

2-13, 1947

THEODORE S. GRAPE,
Seller.

GRACE L. GRAPE,
Wife of Seller.

2-13, 1947

BRIEF FOR APPELLEE

IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 9887

THELMA F. OWEN, *Appellant*,

v.

MAX C. SCHWARTZ, THEODORE S. GRAPE, GRACE
L. GRAPE, *Appellees*.

Appeal from the District Court of the United States for the
District of Columbia.

United States Court of Appeals
for the District of Columbia
Circuit

FILED OCT 7 - 1948

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L. GRAPE, *Appellees*.

Appeal from the District Court of the United States for the
District of Columbia.

COUNTER-STATEMENT OF THE CASE.

In addition to the statement of the appellant, hereinafter called plaintiff, the following statements and correction should be noted.

Plaintiff commenced her action by complaint filed April 22, 1947, which charged among other things, that as an inducement to plaintiff to execute the contract of February 13, 1947, defendant Schwartz represented that "a \$30,000.00 loan *could be secured* on the said house and land. (App. #2) The testimony of the plaintiff and her sister with respect to the alleged misrepresentations was given on March 18, 1948 (App. #5) W. Walker Hargrave, plain-

tiff's witness, testified that he saw the boundaries of the ground without difficulty (App. #7-#8). Plaintiff was at the property on at least two occasions (App. #8) Plaintiff testified that on February 13, 1947, she signed one and only one handwritten contract. Plaintiff identified her signature on a handwritten contract dated February 13th. Motion for directed verdict was granted, and motion for new trial was filed, argued and denied. Among the reasons for denying the motion for new trial and apropos the question of the alleged misrepresentation respecting the \$30,000.00 commitment, the Court stated it refused to consider this point because the complaint charged that the \$30,000.00 loan could be secured. The presumption is that plaintiff states her case in the strongest manner possible in her pleadings and she can't strengthen it by oral evidence. No motion was made to amend the complaint, and if a motion to amend had been made, the Court stated it would have refused it.

SUMMARY OF ARGUMENT.

Plaintiff's case is bottomed entirely upon two alleged misrepresentations; one respecting a commitment for a loan and the other pertaining to the size of the land. The first of these alleged misrepresentations is eliminated because the testimony offered varies from the allegation of the complaint, no motion to amend was made and the Court's indication that amendment would not be permitted. The second alleged misrepresentation is not one which could mislead the plaintiff because she had equal opportunity with defendant Schwartz to view the ground. The Court was clearly within its rights to hold that the handwritten contract introduced by plaintiff was the only handwritten contract that plaintiff signed on February 13, 1947, inasmuch as plaintiff herein testified that she only signed one handwritten contract on that day. The position of defendant Grape (the principal) with respect to any misrepresentation is different from defendant Schwartz (the agent) in that he was not charged with knowledge of them

and the limitation of the agent's authority was known to plaintiff.

ARGUMENT.

I.

Misrepresentation as to Loan.

(a) Defendants agree entirely with the statement of the law as quoted by appellant from 66 Corpus Juris, Sec. 151, p. 598 which states "but a statement that such a person will lend a particular amount thereon, * * * or will procure a party who will make such a loan has been held insufficient for that purpose." There is no doubt that representations with respect to things to happen in the future can not be the basis of fraud. *Hazlett v. Wilkin*, 42 Okla. 20, 140 Pac. 410; *Dibrell v. Central National Bank*, 293 S. W. 874; *Baker v. Baker*, 54 App. D. C. 214, 296 F. 961. *Edwards v. French*, 263 S. W. 132; 304 Mo. 194. The only issue which was before the Court on this point was the alleged misrepresentation that a \$30,000.00 loan *could be* secured on the said house and land (App. #2). The Court would not permit plaintiff to charge a misrepresentation, that the \$30,000.00 loan was in esse (App. #15-#16). Therefore, the contention of plaintiff with respect to the \$30,000.00 commitment is not before this Honorable Court.

(b) The Court has discretion to permit or not permit amendments (Rule 15 (a) Federal Rules of Civil Procedure). It must be pointed out that this evidence was not admitted but was stricken by the Court and therefore plaintiff's contention that there was a curing by trial of the issues by express or implied consent is erroneous. Defendants if overruled on their objection to the evidence on the first ground advanced could have advanced the further grounds of variance. However, the proffered evidence being excluded by the Court on other grounds, it would have been redundant for defendant to have asserted additional grounds for the exclusion of the already excluded evidence.

This case does not come within the provisions of Federal Rule 15 (b), as the issue of the existence of the commitment (which was not raised by the pleadings), was not tried by the express or implied consent of the parties because the testimony with respect thereto was stricken by the Court. Plaintiff cites cases in support of the proposition that an objection not made in the Court below which if raised would have been fatal to the introduction of evidence cannot be raised in the appellate Court. With this line of cases appellees have no quarrel. They are, however, inapplicable to this case. In the first place, a valid reason (variance) for the exclusion of the proffered testimony was considered by the Court below on the motion for new trial. At that time plaintiff, in effect, moved for an amendment to her pleadings, which was denied. Therefore, the Court and all litigants had an opportunity to consider plaintiff's theory respecting the loan and it was eliminated from the case.

There is a second difference between this case and the cases cited by plaintiff. In those cases the Court was wrong in its ruling, as well as its reason, i.e., there was neither present before the Court at the time it made its ruling, nor present in argument before the Appellate Court valid authority to sustain the Trial Court's position. In the instant case, although the reason assigned by the Court at the time of the ruling may have been erroneous, there existed valid authority in support of the Court's ruling which was considered by the parties and the Trial Court later. Under such circumstances this Court cannot disturb that ruling, as an Appellate Court sits only to correct errors of the lower Court. Appellate Courts will not reverse on an invalid ground only to send the case back to have the same evidence excluded at the second trial on a valid ground. See *Fry v. Cudahy*, 256 U. S. 208, 65 L. Ed. 893; *U. S. v. Holt State Bank*, 270 U. S. 49, 56, 70 L. Ed. 465. In the review of judicial proceedings, the rule is settled that if the decision below is correct, it must be affirmed, "although the lower Court relied upon a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U. S. 238, 82 L. Ed. 224. *Se-*

curities Commission v. Chenery Corp., 318 U. S. 80, 87 L. Ed. 626 states "the reason for this rule is obvious. It would be wasteful to send a case back to a lower Court to reinstate a decision which it had already made, but which the appellate Court concluded should properly be based on another ground within the power of the appellate Court to formulate." Appellate Courts will not encourage litigation by granting a new trial which will not benefit the litigant by changing the result. *Booth v. Hairston*, 193 N. C. 278, 136 S. E. 879, 57 ALR 1186. An Appellate Court will not reverse if there exists other valid grounds for objection even though not cited. *Sauers v. Giddings*, 90 Mich. 50, 51 N. W. 265; *Carroll v. United Railway Co.*, 137 S. W. 303, 157 Mo. Ap. 247. The lower Court will be sustained on any valid theory. *Peterson v. Johnson*, 28 Pac. 2d 487, 91 ALR 723.

It is elementary that the granting or denial of an application to amend is within the discretion of the trial Judge whose ruling will not be disturbed unless there has been an abuse of discretion. *Wittmayer v. United States*, 118 Fed. 2d 808; *Stevens Co. v. Foster & Kleiser Co.*, 109 Fed. 2d 764; *Aetna Casualty & Surety Co. v. Abbott*, 130 Fed. 2d 40; *Gormley v. Bunyan*, 138 U. S. 623, 11 S. Ct. 453, 34 L. ed. 1086.

II.

Misrepresentation as to Acreage.

Plaintiff is precluded from showing the alleged misrepresentation as to the size of the land, inasmuch as her testimony shows that she went on the premises and viewed it on at least two occasions (App. #8). Plaintiff's witness, Hargrave, testified that he saw the boundaries of the ground without difficulty (App. #7-#8). *Shappirio v. Goldberg*, 192 U. S. 232; 24 Sup. Ct. 259; 48 L. ed. 419; *Farrar v. Churchill*, 135 U. S. 609, 34 L. ed. 246, 10 S. Ct. 771; *Slaughter v. Gerson*, 13 Wall, 379, 20 L. ed. 627; *Farnsworth v. Duffner*, 142 U. S. 43, 35 L. ed. 931, 12 S. Ct. 164:

Graziani v. Arundell, 55 App. D. C. 21, 299 F. 886. "the material question was as to whether under the evidence there was any misrepresentation as to the number of rooms on the second floor, and as to that, the plaintiff having undertaken to inspect the same, and not having been prevented by defendant or his agent from making a full inspection thereof, was bound to be governed by such inspection and could not be heard to say that he relied upon the representations of the defendant's agent as to the number of rooms on the second floor.

"The verdict as to the \$300 in favor of the defendant was directed upon this theory, to which the plaintiff duly excepted. That the court below correctly stated the law on this issue is well settled. *Southern Development Co. v. De Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. Ed. 678; *Shappirio v. Goldberg*, 20 D. C. App. 185, affirmed in 192 U. S. 232, 24 Sup. Ct. 259, 48 L. Ed. 419."

A vendee who has visited and examined the land in question is precluded from asserting that there was a misrepresentation as to the area. *Lake v. Churchill*, 39 Wash. 318, 81 Pac. 849; *Gordon v. Parmelle*, 2 Allen (Mass.) 212; *Mooney v. Miller*, 102 Mass. 217; *Lynch v. Mercantile Trust Co.*, 5 McCrary 623, 18 Fed. 489; *Mabardy v. McHugh*, 202 Mass. 148, 88 N. E. 894, in which the Court states: "Where the seller of real estate shows upon the face of the earth its true boundaries to the purchaser, and does not fraudulently dissuade him from making full examination and measurement, and the estate is not so extensive, or of such character, as to be reasonably incapable of inspection and estimate, and there is no relation of trust between the parties, the purchaser has no remedy for a misrepresentation as to the area alone."

Further, the purchaser of property cannot avail himself of the seller's misrepresentations, although fraudulently made, where the buyer had an opportunity to investigate and

to learn the truth with respect thereto. *Moore v. Turberville*, 2 Bibb (Ky.) 602, 5 Am. Dec. 642; *Pearce v. Carter*, 3 Houst. (Del.) 385; *Cochram v. Peoples Exchange Bank*, 176 Ark. 830, 4 S. W. (2d) 515; *King v. Lamborn*, 186 F. 21, 108 C. C. A. 123; *Mather v. Barnes*, 146 F. 1000.

III.

QUESTION PUT TO LOLA OWEN.

The plaintiff's contention that the question put to Lola Owen to elicit plaintiff's reliance upon Schwartz's representations was clearly admissible, is erroneous. The question asked involved representations on three matters: (1) that there was a \$30,000.00 commitment. This was properly excluded for the reasons assigned in Part I, *supra*. (2) "That there was an acre and a quarter of ground". This was properly excluded for the reasons pointed out in Part II, *supra*. (3) That it was zoned for rooming houses and apartments. This was properly excluded as not an issue. It was not alleged in the complaint.

Authorities with facts similar to the instant case are:

Dibrell v. Central Natl. Bank, 293 S. W. 874, in which the Court held that:

an action for fraud on the part of a bank, in connection with a sale of live stock by it, will not lie on allegations merely of representations by the bank to the purchaser that the former would give twelve months' credit to the purchaser, if no other fact or circumstance is alleged, tending to show fraud beyond the mere nonfulfilment of the promise, even though it is also alleged that the promisor did not intend to perform the promise.

Edwards v. French (1924) 304 Mo. 194, 263 S. W. 132, where it was held that a promise by agents of the vendor, made in negotiating a sale of real estate, that they had a party or would procure a party who would loan the purchaser sufficient to make a certain cash payment on the purchase price, was a statement of a promissory nature,

and not of an existing fact, and could not constitute fraud affecting the validity of the contract of purchase.

IV.

SEPARATE REASON FOR OWNER-DEFENDANTS.

The contract which was executed by the parties, in Paragraph 17 provides in part that: "This contract contains the final and entire agreement between the parties hereto and * * * they shall not be bound by any terms, conditions, statements, warranties, or representations, oral or written, not herein contained." (App. #18). Plaintiff in her complaint charges that Schwartz made the alleged misrepresentations, but does not charge that Grape made them. (App. #2) Nowhere in the testimony or proffered testimony (App. #6-#14) is there any evidence offered that Grape made any misrepresentations. Therefore, the only way in which Grape can be reached in connection with the alleged misrepresentations is on the basis of of agency, but the above quoted portions of Paragraph 17 of the complaint preclude plaintiff from fastening on to Grape any misrepresentations made by Schwartz. The plaintiff was notified by a provision in the contract that the agent's authority went no farther than the representations embodied in the written contract. Therefore, as between plaintiff and defendant Grape, plaintiff could not show that the agreement was procured by fraudulent representations of the agent. *Gridley v. Tilson*, 202 Cal. 748, 262 Pac. 322; *Colt Co. v. Odom*, 136 Miss. 651, 101 So. 854. See also *Jones v. Bankers Trust Co.*, 235 Fed. 649; *Pease v. Fitzgerald*, 31 Cal. Ap. 727, 161 Pac. 506; *Cannon City Industrial Stores Co. v. McInerney*, 71 Col. 492, 208 Pac. 457; *Colt Co. v. McCullogh*, 141 Miss. 328, 105 So. 744.

CONCLUSION.

It is apparent that there was no error committed by the Trial Court in excluding evidence which was not in issue; in excluding evidence of representations not amounting to fraud; and, so far as defendant Grape is concerned, recognizing the limitation of Grape's agent.

Respectfully submitted,

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